

Summary of Proposals for First Twelve Section 4(b) Antidegradation Exemptions September 9, 2008, Jeff Hyman, Conservation Law Center

The following Table summarizes the environmental community's proposals for how to handle the situations currently treated as exemptions in section 4(b) of the draft antidegradation rule. Our Table differs in three main ways from the table appearing on page 4 of the Antideg. Stakeholder Subgrp. Mtg. Summary 8-12-08 produced and distributed by IDEM.

First, the IDEM table contains three columns with headings "Exemption Citation," "Applicable to BCC," and "Notice of Justification Needed." In our Table, we have expanded IDEM's heading "Notice of Justification Needed" into three separate categories: "Justification by Discharger Required," "Public Notice &/or Comment," and "Simultaneous Guidance Document from IDEM."

Second, we differ with IDEM's entry under the column heading "Applicable to BCC" for exemption 4(b)(11). The extent to which we differ from IDEM's entries under the heading "Notice of Justification Needed" is not clear since our Table expands IDEM's heading into component factors.

Third, reflecting the discussion by the workgroup at the August 12th meeting, we have divided exemption 4(b)(9) into two categories. In the first category, called §4(b)(9a), there is a voluntary, simultaneous, and enforceable decrease in the loading of the same pollutant to the same waterbody within the same facility—that is, in this situation an increased loading from one pipe is negated by a decreased loading from another pipe. In the second category, called §4(b)(9b), there is a voluntary, simultaneous, and enforceable decrease in the loading of the same pollutant to the same watershed (e.g., HUC-12). The amount of justification required for 9b would be greater than for 9a because the ability to ensure no net change in water quality and impact on aquatic life is more uncertain for 9b.

In addition to our specific comments listed in the last column of our Table, we offer the following general comments and proposals regarding the current list of exemptions. An "exemption" from the antidegradation demonstration, to be consistent with the perspectives of EPA and the courts, must be associated with one of two types of situations: (1) a situation that will produce either no decrease in water quality or a *de minimis* decrease in water quality; (2) a situation where a procedure is in place that sufficiently substitutes for antidegradation review (e.g., CERCLA cleanup). In contrast, situations that have the potential to improve overall water quality but that will require analysis of water quality impacts to ensure this potential is met are not properly included as "exemptions;" for example, the situations in §4(b)(9b) and §4(b)(10) of our Table. Such situations, however, may be granted a fast-track antidegradation review process because of general agreement about their potential benefits to water quality.

Section in Draft Rule	Summary Description	Justification by Discharger Required?	Public Notice &/or Comment?	Simultaneous Guidance Document from IDEM?	Apply to BCCs?	Comments/Explanation
§4(b)(1)	Loading covered by permit	NO	NEITHER	NO	YES. See GLI II.D.1, IAC 11.3(b)(1)(C)(i), and IAC 11.7(b)(1)	Pre-approval for discharge would be too burdensome
§4(b)(2)	Bypass	NO	NEITHER	NO	YES. See GLI II.F.2, IAC 11.3(b)(1)(C)(iii)(BB), and IAC 11.7(b)(3)	Pre-approval for discharge would be too burdensome
§4(b)(3)	New monitoring or limit	NO	NEITHER	NO	YES. See GLI II.D.1, IAC 11.3(b)(1)(C)(ii), and IAC 11.7(b)(2)	New dischargers held to higher standard
§4(b)(4)	Pollutant in intake water	YES	NOTICE ONLY	YES	YES. See IAC 11.3(b)(1)(C)(iii)(CC) and IAC 11.7(c)(1)(E)	Discharger not responsible
§4(b)(5)	Control on wet weather flow or storm water	YES	NEITHER	YES	YES. See IAC 11.3(b)(1)(C)(iii)(GG) and IAC 11.7(c)(1)(C)	Public will have chance to comment on control permits, but discharge depends on weather events.
§4(b)(6)	Short term and limited	YES	BOTH	YES	YES. See GLI II.F.1, IAC 11.3(b)(1)(C)(iii)(AA), and IAC 11.7(c)(1)(A)	Brad and I will suggest language to Sept. workshop regarding limited magnitude (see also EPA Region VIII guidance).
§4(b)(7)	CERCLA/RCRA actions	YES	NOTICE ONLY	YES	YES. See GLI II.F.3, IAC 11.3(b)(1)(C)(iii)(EE), and IAC 11.7(c)(1)(B)	Provides justification for loading.
§4(b)(8)	Increase in sewered area	YES	BOTH	YES	YES. See IAC 11.3(b)(1)(C)(iii)(FF) and IAC 11.7(b)(4)	At Sept. workshop I will request addition of language to ensure “there is no increased loading of BCCs from nondomestic wastes.”

Section	Summary	Justification by Discharger Required?	Public Notice &/or Comment?	Simultaneous Guidance Document from IDEM?	Apply to BCCs?	Comments/Explanation
§4(b)(9a)	Simultaneous decrease of same pollutant from another outfall of same facility into same waterbody	YES	NOTICE ONLY	YES	YES.	
§4(b)(9b)	Simultaneous decrease of same pollutant from same or another facility in watershed	YES	BOTH	YES	NO. See 327 IAC 11.3(b)(1)(C)(iii)(DD) and 327 IAC 11.7(c)(2)(A)	Watershed scale problematic. Analogous exemptions in 327 IAC 11.3 and 11.7 do not apply to BCCs. EPA trading guidance recommends trading should not apply to BCCs.
§4(b)(10)	Increase in pollutant A necessary to reduce more toxic pollutant B	YES	YES	YES	NO. See 327 IAC 11.3(b)(1)(C)(iii)(DD) and 327 IAC 11.7(c)(2)(B)	Cross-pollutant trades problematic. The analogous exemptions under 327 IAC 11.3 and 11.7 do not apply to BCCs. This is logical, since BCCs are not the only “bioaccumulative” pollutants. Also, EPA trading guidance recommends trading should not apply to BCCs. Moreover, I have assumed this exemption must account for magnitude of discharges, and I will discuss this at Sept. workshop.
§4(b)(11)	Non-contact cooling water	YES	BOTH	YES	NO. See 327 IAC 11.3(b)(1)(C)(iii)(HH)	
§4(b)(12)	Approved water treatment additives	YES	BOTH	YES	NO. See 327 IAC 11.3(b)(1)(C)(iii)(LL) and 327 IAC 11.7(c)(1)(D)	Assume each additive goes through separate approval process.